NO. 51615-2-II

Court of Appeals, Division II
of the State of Washington

In re

Andrew Weiser, Appellant

and

Michelle Weiser, Respondent.

Supplemental Brief of Appellant

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I. INTRODUCTION

On December 9, 2019, this Court entered an order directing the parties to file supplemental briefs, addressing whether "res judicata prevents the reopening of the decree of dissolution or the settlement agreement." Appellant (hereafter "Andrew") argues that the state court is *without jurisdiction* to enter an order of judgment (by agreement of the parties or adjudication by the court) to enter any order or judgment that is preempted by federal law.

II. ARGUMENT

A. The state court had no subject-matter jurisdiction to enter the February 4, 2011 order because it was contrary to preemptive federal law.

Res judicata does not apply because the state court had no authority to award to any VA disability benefits to Michelle, even by agreement, when it approved the agreement on February 4, 2011. It had no subject-matter jurisdiction to enter the agreed settlement because the provision requiring that Andrew reimburse Michelle was void from the onset; because, as *Howell* reiterates, the state court had no authority to award a benefit, that which it had no authority to give. *Howell v. Howell*, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017), citing 38 USC 5301.

Regardless of whether a court order is adjudicated by the courts or if it was entered by agreement, when a state court lacks subject matter jurisdiction to enter an order because federal law absolutely preempts it, it is not enforceable. *Sprietsma v. Mercury Marine*, 537 US 51; 123 S.Ct. 518; 154 L.Ed. 2d 466 (2002). Accordingly, the order requiring Andrew to reimburse Michelle for the VA disability benefits he receives as a result of his election, was based on a federally preempted order, and is therefore void.

When a state court fails to honor federal rights, the United States Supreme court has "power over the state court to correct them to the extent that they incorrectly adjudge federal rights." *Ridgway v. Ridgway*, 454 US 46, 54; 102 S.Ct 49; 70 L. Ed 2d 39 (1981), citing *Herb v. Pitcairn*, 324 US 117, 125-26; 65 S. Ct 459; 89 L Ed 789 (1945). The court in *Ridgway* held that "a state divorce decree, must give way to conflicting federal law. *Id.* at 55, citing the Supremacy Clause, US Const. Art VI, cl 2. (court held that the anti-attachment provision, which is similar to 38 USC 5301, protected a veteran's designation of a beneficiary to receive his life insurance benefits to his current wife, *even though this was contrary to the parties' property settlement agreement memorialized in a state court order*, that a state court could not

impose a constructive trust on the proceeds because violated the federal anti-attachment provision). *Ridgway* 454 US at 53-56.

> Federal preemption of state law is grounded in the Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, which "invalidates state laws that interfere with, or are contrary to federal law." *Hillsborough Co. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 712; 105 S.Ct. 2371; 85 L. Ed. 2d. 714 (1985), quoting *Gibbons v. Ogden*, 22 U.S. (9Wheat) 1, 211; 6 L.Ed. 23 (1824). When a state law is preempted by federal law, the state law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746; 101 S.Ct. 2114; 68 L.Ed. 2d 576 (1981).

Therefore, a state court loses jurisdiction from the onset because of the preemptive effect of federal law, and the state court order becomes unenforceable. *Ridgway v. Ridgway*, 454 US at 54.

Here, Thurston County Superior Court acted incorrectly when it approved of the parties' settlement agreement where Andrew, in effect, would have to part with his VA disability benefit if he elected to receive this. Still, the court's entry of the decree was *void ab initio*, and therefore, had no jurisdiction because this was contrary to federal law, specifically, the provisions under 38 USC 5301.

"The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Kalb v. Feuerstein*, 308 US 433, 439, n 12; 60 S. Ct 343; 84 L. Ed 370, 375 (1940). Any attempt by a state court to

get around the operation of federal law is subject to collateral attack. *Id.*

When the decree was entered by agreement on February 4, 2011, the law with regard to the non-assignability of VA benefits, was essentially, the same as it is today, in that a state court could not require, through any order, require a veteran to pay his VA disability benefits to a former spouse. *McCarty v. McCarty*, 453 US 210, 218-236; 101 S.Ct 2728; 69 L. Ed 2d 589 (1981); *Mansell v. Mansell*, 490 US 581, 588-595; 109 S.Ct 2023; 104 L. Ed 675 (1989); *Howell*, 137 S.Ct at 1400-1407. *Howell* did nothing but clarify that federal law has ALWAYS applied and preempted state courts on this issue. *Howell* also held that state courts cannot enforce orders that seek to indemnify or reimburse the veteran's former spouse for any loss of the retired pay where the veteran is required to waive that pay to receive disability pay, stating "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *Howell*, 137 S. Ct. at 1406. All such orders are thus pre-empted." *Id.*

This means that Thurston County Superior Court had no jurisdiction to have entered the February 4, 2011 order or the judgment entered on January 26, 2018, even if the decree was entered by agreement. Because the portion of the order that awards Michelle, Andrew's VA disability benefit, is contrary to federal law; it is therefore, *void ab initio*, and may be challenged at any time. *Semmes v. United States*, 91 U.S. 21; 23 L.Ed. 193, 195 (1875). The language in the February 4, 2011 decree had always violated federal law, because it requires that Andrew is to use his disability pay to make up the difference of any loss of Michelle's portion of retired pay. Accordingly, if the order was enforced, it would violate the prohibition against assignment of VA benefits provided by in 38 USC 5301(a)(1), and a state court could not force the payment of VA disability, pursuant to that order.

B. **Howell is significant because the court reconfirmed that state courts NEVER had the initial jurisdiction under the anti-attachment provision, 38 USC 5301.**

In order to understand the Court's reasoning in *Howell*, it is important to understand the history of the Court's rulings on this issue. In *Mansell*, the parties reached a property settlement agreement and the Court held that under the USFSPA, it preempted the state court from dividing the veteran's VA disability compensation. *Mansell v. Mansell*, 490 US 581 (1989). While the

court in *Mansell* came close to addressing whether res judicata is a defense, it relied solely on the USFSPA and held that state courts could not divide the veteran's VA disability benefits. *Mansell v. Mansell*, 490 US 581, 586 n.5, 587 n.6 (1989). In other words, *Mansell* did not address whether a state court's order, entered by agreement that divides preempted VA disability benefits is final; and therefore, could not be reopened.

Howell, addressed this issue when it explicitly stated that state courts have always been barred to exercise authority over any non-disposable benefits under 38 USC 5301(a)(1). *Howell*, 137 S. Ct at 1405. In citing 38 USC 5301, *Howell* held that the preexisting federal preemption under this provision, precludes state courts from exercising any authority over VA disability benefits. *See Howell*, 137 S. Ct at 1406. This means that the portion of the February 4, 2011 order requiring Andrew to part with this VA disability pay, even if it was by agreement, was a void order and Thurston County Superior Court should have reviewed the decree and stricken this provision when it approved and signed it on February 4, 2011.

38 USC 5301(a)(1) states the following:

> Payments of benefits due or to become due under any law administered by the Secretary [Veterans Affairs] shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary...shall not be liable to attachment, levy, or

> seizure by or ***under any legal or equitable process*** whatever, either before or after receipt by the beneficiary..."

38 USC 5301 (a)(3)(A) further states:

> This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation...***enters into an agreement with another person under which agreement*** such other person acquires for consideration the right to receive such benefit by payment of such compensation...such agreement shall be deemed to be an assignment and is ***prohibited***.

Howell does not, nor do previous holdings in *Mansell* and *McCarty*, explicitly differentiate whether orders entered by agreement should be treated differently from those that are adjudicated. However, the holding in *Howell* implicitly addresses this point by relying on the anti-attachment provision in 38 USC 5301, and from the enactment of this provision, Congress had intended to prevent state courts from exercising any authority over the VA disability benefits. *Howell*, at 1405. (state courts could not vest [in the former spouse], that which, [under governing law , 38 USC 5301 (a)(1)], they lack authority to give. *Id.*

38 USC 5301 also protects VA disability benefits against "any legal or equitable process." 38 USC 5301(a)(1). This includes agreements entered by the parties. 38 USC 5301(a)(3)(A). As such, the agreement reached by the parties in this case, to include the order arising out of Michelle's motion to enforce the February 4,

2011 decree, is prohibited because it requires Andrew to pay non-disposable benefits to Michelle.

Finally, Howell addresses equitable remedies permitted by a state court to anticipate a future reduction in disposable retired pay. Admittedly, this presents a challenge for state courts in determining an equitable division or marital assets. Essentially, a state court must divide assets in a manner where it must anticipate that military retired pay may be eliminated due to a VA waiver by the veteran. This can be achieved through a disproportionate division of marital assets, spousal maintenance for a longer duration, or perhaps the requirement that education benefits is transferred to the former spouse. Still, it is significant to note that Howell, unequivocally held that state courts are not permitted to order any dollar-for-dollar "spousal maintenance," to commence when the veteran elects to receive VA disability benefits, nor is a state court permitted to require that a veteran pay out any portion of his VA disability benefit to a former spouse, even if this was agreed upon in the dissolution. Howell, 137 S. Ct. at 1405, 38 USC 5301(a)(1).

The decree in this case, violates the holding in Howell, and the anti-assignment provision in 38 USC 5301, because the state court required that Andrew pay Michelle his VA benefits.

II. **CONCLUSION**

As of the January 26, 2018 judgment, Andrew continues to follow an order that is preempted by federal law. Thurston County Superior Court has wrongfully deprived Andrew of a constitutionally protected benefit that he earned for the sacrifices he has made for our country. This court has a duty to recognize that under the Supremacy Clause of the United States Constitution, it must follow federal law, which requires it to right the wrong, here, and reverse Thurston County Superior Court. Most important, this court must clarify for the residents of this state that under Howell and federal law, VA benefits cannot be assigned under any circumstances, nor can veteran be required to reimburse a former spouse for electing to receive such benefits.

Because the state courts have exercised their authority to make additional awards to a former spouse to restore his or her "rights" this practice should not continue to be permitted because a state court disagrees with federal law. The court in *Howell* cited 10 USC 1408(a)(4)(B) and (c)(1); and 38 USC 5301 and *McCarty*, in holding that state courts *have always* been preempted from ordering a veteran to indemnify a former spouse regardless of when the veteran chose to waive retired pay. *Id.* at 1404. The United State Supreme Court cited 38 USC 5301(a)(1), directly

stating state court had no authority to vest, or otherwise award federally protected benefits.

Since part of the February 4, 2011 order is contrary to preemptive federal law, that part of the order is void because it violated federal law at the onset. Accordingly, the enforcement could be challenged through an appeal and res judicata does not apply. This means that, not only is the January 26, 2018 judgment requiring that Andrew pay Michelle part of his VA disability going forward is terminated, but he also has the right to recoupment of the VA benefits he has already paid, pursuant to that order.

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Kathleen A. Forrest, being first duly sworn oath, deposes and says: that on the date given below, I served a copy of **Appellant's Supplemental Brief** and this is Proof of Service on the following persons:

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THE UNDERSIGNED declares under penalty of perjury of the State of Washington that this Appellant's Supplemental Brief and Declaration of Service was served on counsels for MICHELLE WEISER listed above by email and addressed on December 23, 2019.

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